Supreme Court, U.S.
FILED
AUG 14 2000
CLERK

No. 99-1132

In The Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

CHARLES McARTHUR,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR RESPONDENT

Deanne Fortna Jones
Counsel of Record

Jeff Justice
515 Millikin Court
Decatur, Illinois 62523
Tele: (217) 422-9800
Counsel for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether securing a home to prevent the destruction of evidence of a petty offense or misdemeanor is unreasonable under the Fourth Amendment when the police do so by barring the home's owners from entry, and entering into the home without a warrant in order to observe the owner's actions inside.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i.
TABLE OF CONTENTS	ii.
TABLE OF AUTHORITIES	iii.
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. WHETHER THE OFFICERS' SECURING OF MR. MCARTHUR'S HOME EXTERNALLY AND BY ENTERING INSIDE DESPITE BEING DENIED PERMISSION TO SEARCH VIOLATED THE FOURTH AMENDMENT	4
A. Whether Mr. McArthur's Home and Person Were Seized	7
1. Seizure of property	8
2. Seizure of a person	13
B. Whether a Warrantless Entry and Search Occurred	14
1. Exigent circumstances	16
2. Consent to entry	21
II. THIS COURT SHOULD BAR SEIZURES OF AND WARRANTLESS ENTRIES INTO HOMES TO PRESERVE EVIDENCE IN CASES WHERE MISDEMEANOR OFFENSES ARE INVOLVED	25
III. THE POLICE OFFICERS' VIOLATION OF THE FOURTH AMENDMENT WARRANTS EXCLUSION OF THE EVIDENCE OF MR. 68	
CONCLUSION	40

TABLE OF AUTHORITIES

Cases	*Page(s)*
Argersinger v. Hamlin, 407 U.S. 25 (1972)	34
Arizona v. Hicks, 480 U.S. 321 (1987)	9, 40
Arkansas v. Sanders, 442, U.S. 753 (1979)	5, 15
Bumper v. North Carolina, 391 U.S. 543 (1968)	22
Commonwealth v. DiSanto, 8 Mass. App. Ct. 694, 397 N.E.2d 672 (1979)	27
Commonwealth v. Hamilton, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987)	17, 18
Conway v. Pasadena Humane Society, 48 Cal. App. 4th. 163, 52 Cal. Rptr. 2d 777 (1996)	27
Coolidge v. New Hampshire 403 U.S. 443 (1971)	16
Delaware v. Prouse, 440 U.S.648, 654 (1979)	8

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) 26

Dunaway v. New York, 442 U.S. 200 (1979) 29

Duncan v. Louisiana, 391 U.S. 145 (1968) 34

Florida v. Royer, 460 U.S. 491 (1983) 6

Gouled v. United States, 255 U.S. 298 (1921) 5

Hawaii v. Dorson, 61 Haw. 326, 615 P.2d 740 (1980) 24

Johnson v. United States, 333 U.S. 10 (1948) 5, 16, 22

Jones v. State, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995) 28

Llaguno v. Mingey, 763 F2d. 1560 (7th Cir. 1985) 27

Mapp v. Ohio, 367 U.S. 643, 656 (1961) 37

McDonald v. United States, 335 U.S. 451 (1948) 6, 18, 26

Miller v. United States, 357 U.S. 301 (1958) . 15

Mincey v. Arizona, 437 U.S. 385 (1978) 6

Olmstead v. United States, 277 U.S. 438 (1928) 38

Payton v. New York, 445 U.S. 573 (1980) 15, 16, 27, 32, 35

People v. Griffin, 727 P.2d 55 (Colo. 1986) 28

People v. Lukach, 263 Ill. App. 3d 318, 635 N.E.2d 1053 (2nd Dist. 1994) 12

People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) 7, 10

People v. Miller, 773 P.2d 1053 (Colo. 1989) 27

People v. Odom, 83 Ill. App. 3d 1022, 404 N.E.2d 997 (3rd Dist. 1980) 12

People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (3rd Dist. 1978) 12

People v. Payne, 239 Ill. App. 3d 698 N.E.2d 375 (5th Dist. 1997) 12

People v. Reinhardt, 141 Mich. App. 173, 366 N.W.2d 601 (1986) 27

People v. Smith, 7 Cal. 3d 282, 10 Cal. Rptr. 893, 496 P.2d 1261 (1972) 17

People v. Wahlens, 111 Ill. App. 3d 194, 443 N.E.2d 728 (4th Dist. 1982) 22

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 16, 22

Segura v. United States, 468 U.S. 796 (1984) 9, 10, 11, 14, 37, 38

State v. Alayon, 459 N.W.2d 325 (Minn. 1990), *cert. denied*, 498 U.S. 109 (1991) 28

State v. Bennett, 295 N.W. 2d 5 (S.D. 1980) 27

State v. Canby, 162 W. Va. 666, 252 S.E.2d 164 (1979) 27, 33

State v. Clark, 218 Kan. 726, 544 P.2d 1372, *cert. denied*, 426 U.S. 939 (1976) 27

State v. DeLane, 207 N.J. Super. 45, 503 A.2d 903 (1986) 28

State v. Guertin, 190 Conn. 440, 461 A.2d 963 (1983) 27, 32, 33

State v. Hull, 210 Conn. 481, 556 A.2d 154 (1989) 28

State v. Kin Ng, 104 Wash. 2d 763, 713 P.2d 63 (1985) 28

State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995) 28

State v. Ramirez, 49 Wash. App. 814, 746 P.2d 344 (1987) 27

State v. Smith, 458 N.W.2d 779 (S.D. 1990) .. 28

State v. Storvick, 428 N.W.2d 55 (Minn. 1988) 27

Steagald v. United States, 451 U.S. 204, 215 (1981) 32

Tennessee v. Garner, 471 U.S. 1 (1985) 33, 34

Terry v. Ohio, 392 U.S. 1 (1968) 6, 9, 16, 25

Texas v. Brown, 460 U.S. 730 (1983) 6, 8

United States v. Aquino, 836 F.2d 1268 (10th Cir. 1988) 17, 27

United States v. Baldacchino, 762 F.2d 175 (1st Cir. 1985) 27

United States v. Cattouse, 846 F.2d 144 (2d Cir.) *cert. denied* 488 U.S. 929 (1988) 27

United States v. Crespo DeLano, 838 F.2d 1006 (9th Cir. 1987) 28

United States vs. Davis, 423 F.2d 974 (5th Cir.), *cert. denied*, 400 U.S. 838 (1970) 17

United States v. Diaz, 814 F.2d 454 (7th Cir. 1987) 27

United States v. Driver, 776 F.2d 807 (9th Cir. 1985) 17

United States v. Jacobsen, 446 U.S. 109 (1984) 9

United States v. Karo, 468 U.S. 705 (1984) 6, 16

United States v. Korman, 614 F.2d 541 (6th Cir. 1981) 38

United States v. Leon, 468 U.S. 897 (1984) 31

United States v. Martinez-Gonzalez, 686 F.2d 93 (2d Cir. 1982) 27

United States v. Morales, 868 F.2d 1562 (11th Cir. 1989) 29

United States v. Munoz-Guerra 788 F.2d 295 (5th Cir. 1986) 18

United States v. Perez, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) 17

United States v. Place, 462 U.S. 696 (1983) 9

United States v. Riley, 968 F.2d 422, 425 n.5 (5th Cir.) 28

United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) 28

United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974) 20

United States v. Rubin, 474 F.2d 262 (3d Cir. 1973) 27

United States v. Scheets, 188 F.3d 829 (7th Cir. 1999), *cert. denied*, U.S., 120 S. Ct. 837 (2000) 29

United States v. Socey, 846 F.2d 1439 (D.C. Cir.) *cert. denied*, 488 U.S. 858 (1988) 27

United States v. Thompson, 700 F.2d 944 (5th Cir. 1983) 18

United States v. United States District Court, 407 U.S. 297 (1972) 5, 14

United States v. Watson, 423 U.S. 411 (1976) 36

United States v. Whaley, 779 F.2d 585 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) 6

Vale v. Louisiana, 399 U.S. 30 (1970) 17

Welsh v. Wisconsin, 466 U. S. 740 (1984) 14, 16, 17, 18, 19, 20, 25, 26

Wong Sun v. United States, 371 U.S. 471 (1963) 38

Youtz v. State, 494 So. 2d 189 (Ala. Ct. App. 1986) 17, 27

Statutory Provisions

720 ILCS 5/16-10 35
720 ILCS 5/28-1 35
730 ILCS 5-8-3 3
730 ILCS 5-9-1 3
735 ILCS 5/16-1 35

Other

3 W. LaFave, *Search and Seizure* (3d ed. 1996) 10, 11, 14, 29, 38

W. LaFave & A. Scott, *Criminal Law* (1972) 33

W. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439 (1991) 25, 29,30, 31, 32, 33, 34, 35

W. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 Mich. L. Rev. 427 (1986) 29

SUMMARY OF ARGUMENT

In this case, the police effected the two-hour impoundment of Mr. McArthur's home in order to preserve evidence of two misdemeanor crimes while a search warrant was being obtained. The impoundment of Mr. McArthur's home was accomplished by preventing his entry inside, and through warrantless entries to observe his actions when he went inside to make phone calls and obtain cigarettes. There were no exigent circumstances justifying the officers' actions. The 2.3 grams of marijuana, one hitter and pipe were not in imminent danger of destruction. In fact, even though he was aware of the police presence outside, Mr. McArthur made no effort to get rid of the contraband until the police informed him that they wanted to search his home. Furthermore, no consent was obtained for the officer's entries.

A three-part analysis should be applied in determining whether the officers' actions violated Mr. McArthur's Fourth Amendment rights. First, this Court should determine whether a seizure occurred. The parties do not dispute that the officers seized Mr. McArthur's home. The parties also agree that a seizure of his person did not occur. Because the parties concur that a seizure of Mr. McArthur's home took place, this Court should compare the interests of the State versus Mr. McArthur in deciding whether it was reasonable under the circumstances. In striking this balance, this Court should compare the State's interests in prosecuting Mr. McArthur for two misdemeanor offenses to the invasion of Mr. McArthur's possessory interests in his home.

Second, this Court should consider whether a warrantless search was made in effecting the impoundment of Mr. McArthur's home. If so, this Court must likewise determine

whether the search was reasonable by comparing the State's interests against Mr. McArthur's. The third step in this Court's analysis is to determine if the officers acted illegally, then the Court must decide whether the evidence seized as a result of this conduct should be excluded.

In applying the Fourth Amendment's balancing test to an impoundment of the home, the seriousness of the offense should be a decisive factor. This Court has considered the seriousness of the offense when deciding other constitutional issues, including the constitutionality of warrantless entries to preserve evidence. Thus, it is logical that it would likewise be a consideration in impoundment cases.

Impoundment of a home by preventing its owner from entering and by warrantless entries inside is not always unreasonable under the Fourth Amendment's balancing test. If a felony or serious offense is involved, such an impoundment may be permissible providing it is justified by exigent circumstances. However, this Court should announce a bright line rule that the State's interest does not outweigh the citizen's Fourth Amendment rights to be free from warrantless entries and seizures when the State seeks to secure evidence of a misdemeanor or petty offense by impoundment of the home. In order to enforce that rule, evidence obtained by such means should be excluded even it if is ultimately found by virtue of a search warrant.

In this case, at stake was the police's ability to recover 2.3 grams of marijuana, a one hitter and pipe versus Mr. McArthur's privacy and possessory interests in his home. Had these items not been suppressed, the State would have been able to prosecute Mr. McArthur for two misdemeanor offenses. Given the fact that minor offenses were at issue, the State's

interests did not outweigh the invasion of Mr. McArthur's Fourth Amendment possessory and privacy rights in his home. Therefore, the decision of the Illinois Appellate Court should be affirmed.

ARGUMENT

In this case, the police knocked on Mr. McArthur's door and asked for permission to search inside because they believed he had contraband. When he refused their entry, they seized Mr. McArthur's home while a search warrant was obtained. The police prevented Mr. McArthur or anyone else he invited over from entering unless the police escorted them inside. Before the search warrant was obtained, Mr. McArthur went inside his home to make phone calls and obtain cigarettes and was accompanied by Officer Love despite Officer Love being denied permission to enter. (Jt. App. 27-28). Mr. McArthur admitted that if he had been permitted to enter alone, he would have destroyed the 2.3 grams of marijuana. It is also reasonably inferred from the record that if the police had not asked to search, Mr. McArthur would not have thought of destroying the 2.3 grams of marijuana and paraphernalia because the contraband had remained intact inside his home the entire time the police waited outside while Mrs. McArthur moved her possessions out.

Here, the offenses at issue were a Class A misdemeanor punishable by less than one year in jail and up to $2,500 in fines; and a Class C misdemeanor carrying a possible term of not more than 30 days and up to $1,500 in fines. 730 ILCS 5/5-8-3; 730 ILCS 5-9-1. As demonstrated by the possible penalties, the criminal activity afoot inside Mr. McArthur's home did not justify the 2-½ hour intrusion on Mr. McArthur's possessory interests in his home, and the warrantless entries inside.

The Illinois Appellate Court found that the trial court had not abused its discretion in concluding that Mr. McArthur's Fourth Amendment rights were violated despite the fact that he was committing a crime because the officers were not justified in seizing Mr. McArthur's home. Mr. McArthur respectfully requests that this Court affirm that ruling.

I. WHETHER THE OFFICERS' SECURING OF MR. MCARTHUR'S HOME EXTERNALLY AND BY ENTERING INSIDE DESPITE BEING DENIED PERMISSION TO SEARCH VIOLATED THE FOURTH AMENDMENT

This Court must determine whether a seizure and search of Mr. McArthur's home, and a seizure of his person occurred during the impoundment. If it answers any of those questions in the affirmative, then the Court must decide whether the State's actions were reasonable under the circumstances. The State contends that the police should be able to "maintain the status quo" by prohibiting entry into a residence by its unarrested occupants while a search warrant is being obtained in order to prevent the destruction of evidence. This Court should keep in mind that this scenario is not what occurred in Mr. McArthur's case. Rather, the police likely ordered Mr. McArthur outside of his home,[1] and also entered inside without a warrant to watch Mr. McArthur's activities. Thus, contrary to the State's assertion, Officer Love effected both a seizure and a search of Mr. McArthur's home during the impoundment. Accordingly, Mr. McArthur's possessory and privacy rights were affected.

---

[1] Officer Love could not recall whether he instructed Mr. McArthur to come outside or if Mr. McArthur walked out on his own. (Jt. App. 17).

The law interpreting the Fourth Amendment is greatly concerned with police activities that infringe upon the sanctity and privacy of the home. As outlined below, this Court should find that the State's interests in preserving the evidence of Mr. McArthur's misdemeanor offenses do not outweigh Mr. McArthur's possessory and privacy rights in his home.

The Fourth Amendment protects the privacy and security of persons by guaranteeing:

> '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The prominent place the warrant requirement is given in our decisions reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.'

Arkansas v. Sanders, 442 U.S. 753, 759 (1979)(quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972)). Privacy interests are also furthered, "[b]y requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Sanders*, 442 U.S. at 759(quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Furthermore, the Fourth Amendment is to "receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255

U.S. 298, 304 (1921).

The Fourth Amendment's rule of reasonableness governs seizures of people and property. *Texas v. Brown*, 460 U.S. 730, 739 (1983). It is the State's burden to demonstrate the justifiability of a seizure it seeks to uphold. See cf. *Florida v. Royer*, 460 U.S. 491, 501 (1983). Furthermore, an officer's good or bad faith in performing a seizure is irrelevant to a determination of its constitutional reasonableness. See e.g. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

The protection afforded by the Fourth Amendment against unreasonable searches and seizures applies to the innocent and guilty alike. *McDonald v. United States*, 335 U.S. 451, 453 (1948). Courts have agreed that a person's expectations of privacy in his home are not reduced simply because he is committing a crime or has evidence of a crime hidden therein. See e.g., *Mincey v. Arizona*, 437 U.S. 385, 391 (1978); *United States v. Whaley*, 779 F.2d 585, 591 n.8 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). As this Court has observed, to conclude otherwise "would convict the suspect even before the evidence against him was gathered." *Mincey*, 437 U.S. at 391. Accordingly, although Mr. McArthur was committing Class A and Class C misdemeanors at the time the officers seized his home and made warrantless entries inside, he was no less entitled to the protections of the Fourth Amendment than any other citizen. *United States v. Karo*, 468 U.S. 705, 717 (1984).

Therefore, the actions of Officers Love and Skidis are to be balanced against the intrusions into Mr. McArthur's privacy and security in light of the State of Illinois' interests in prosecuting him for the Class A misdemeanor of possession of drug paraphernalia and the Class C misdemeanor of possession of less than 2.5 grams of marijuana. The State contends that the

balance falls in favor of the State's interests at the cost of the limited Fourth Amendment intrusion created by Mr. McArthur being denied access to his home. However, Mr. McArthur was not merely denied the right to enter his home. Rather, Mr. McArthur's home was seized and the officers made warrantless entries into his home.

A. Whether Mr. McArthur's Home and Person Were Seized.

Clearly, the officers' conduct in preventing Mr. McArthur from entering his home without a police escort must be judged under the Fourth Amendment. Here, Mr. McArthur was forbidden to step inside of his home as soon as he came outside and denied the police permission to search it. (Jt. App. 17, 26-27). Officer Love could not recall whether he ordered Mr. McArthur to step outside or whether Mr. McArthur walked outside on his own. (Jt. App. 17). Once outside, he was forbidden to reenter his home alone, even though Mr. McArthur asked for permission to do so. (Jt. App. 26-27). When Mr. McArthur went inside to call his mother and sister, Officer Love stepped inside the door and kept his eyes on Mr. McArthur. After Mr. McArthur completed the calls, he had to leave his home again. Furthermore, Mr. McArthur was told that no one else could come inside his home unless the police also entered. (Jt. App. 17-18). Under these circumstances, the Illinois Appellate Court correctly found that Mr. McArthur's home was seized within the meaning of the Fourth Amendment, and appropriately pondered whether his person was seized.[2]

---

[2] The Illinois Appellate Court was "unclear" whether Mr. McArthur's person was seized. *People v. McArthur*, 304 Ill. App. 3d 395, 403, 713, N.E.2d 93, 98 (4th Dist. 1999).

1. Seizure of Property

The State concedes only that Mr. McArthur's home was seized. (Pet. Brief, at 7). The State and *amicus* contend that the State's interests in securing evidence against destruction outweighed the lesser Fourth Amendment interests of Mr. McArthur in having the freedom to enter his home unaccompanied by the police. The State asserts that the infringement on Mr. McArthur's possessory interests was mitigated by the fact that he could reenter his home under police observation. (Pet. Brief, at 12). Furthermore, the State claims that the two-hour dispossession of Mr. McArthur's home was an eminently reasonable time in which to obtain a search warrant. (Pet. Brief, at 12).

The State's argument should be rejected because the conduct cannot be judged in the context of a simple external seizure of Mr. McArthur's home. Rather, this Court must examine the totality of the impoundment process including the warrantless entries into Mr. McArthur's premises and the restraining of his person from going into his own home.

If the Court agrees that a seizure of Mr. McArthur's home occurred during the impoundment, then it must determine whether it was reasonable under the circumstances. In determining whether a particular course of action by the police violates a citizen's rights, this Court has ruled that an officer's action "is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Texas v. Brown*, 460 U.S. 730, 739 (1983)(quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). This Court has viewed the seizure of personal property as *per se* unreasonable unless it is done pursuant to a warrant issued upon probable cause and describing the items to be seized. *United*

States v. Place, 462 U.S. 696, 701 (1983); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

The *Place* Court also noted that a seizure of personal property reasonable at its beginning may become unreasonable due to its duration or "if its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *United States v. Jacobsen*, 466 U.S.109, 124 (1984); *Place*, 462 U.S. at 709-10. Although the *Place* court declined to adopt any time limitation for a permissible *Terry* type seizure of personal property, it found that the 90-minute detention of Place's luggage was "sufficient to render the seizure unreasonable." Id. at 710. Here, the seizure of Mr. McArthur's home lasted nearly two hours. (Jt. App. at 40). Thus, the seizure resulted in a significant deprivation of Mr. McArthur's possessory interests in his home.

The Illinois Appellate Court correctly found that the seizure of Mr. McArthur's home was unreasonable because no authority existed for such an action. In reaching that conclusion, the appellate court examined this Court's decision in *Segura v. United States*, 468 U.S. 796 (1984). In *Segura*, the police arrested the petitioner in the lobby of his apartment building and took him to his apartment. Four others were waiting in Segura's apartment and the police arrested them after viewing contraband in plain view and took all five into custody. Two agents waited inside Segura's apartment for nineteen hours until a search warrant was obtained. A subsequent search pursuant to the warrant yielded cocaine, ammunition, cash and records of narcotics transactions. Segura moved to suppress the evidence on the grounds that his apartment was illegally seized. In a 5-4 decision, the Court affirmed the petitioner's conviction on the grounds that any illegality in the initial entry would not require

suppression of the evidence because it had an independent source for its discovery.

However, in Part IV of the decision, joined in by Chief Justice Burger and Justice O'Connor, the Court stated that "securing a dwelling on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents" under the Fourth Amendment. *Segura*, 468 U.S. at 810 (Burger, C.J., joined by O'Connor, J.). The entire Court did not decide whether the agent's actions constituted a seizure of Segura's apartment because the nineteen-hour occupation of the apartment was not unreasonable under the totality of the circumstances. Moreover, the Court did not express an opinion on whether the impoundment of a home may "legitimately extend to limiting the freedom of movement of persons within, into or out of the impounded premises." *McArthur*, 304 Ill. App. 3d at 400, 713 N.E.2d at 96(quoting 3 W. LaFave, *Search and Seizure*, sec. 6.5(c), at 366 (3d ed. 1996)(hereinafter "LaFave")). The Illinois Appellate Court concluded that Mr. McArthur's case did not fall within the fact pattern of *Segura* or any of the three situations in which courts typically upheld the securing of a residence while seeking a search warrant. Thus, it held that the securing of and entering into Mr. McArthur's home without a warrant was unreasonable.

A comparison of the facts in *Segura* to Mr. McArthur's case reveal that the Illinois Appellate Court's holding was not against the manifest weight of the evidence. As observed by Prof. LaFave, "*Segura* . . . certainly has no bearing upon those instances in which the impoundment also involved some interference with the freedom of movement of those authorized to be at the premises." LaFave, at 371-72. Prof. LaFave reached this conclusion because the persons with a possessory interest

in Segura's apartment were in custody during the nineteen-hour occupation. LaFave, at 364. Here, Mr. McArthur was not in custody. Therefore, his freedom of movement with respect to entry into his home was restrained and the impoundment of his home certainly interfered with his possessory interests.

Furthermore, a comparison of the two cases demonstrates that *Segura* does not support the State's argument that the officers' actions constituted a minimum intrusion onto Mr. McArthur's Fourth Amendment rights because the State has conveniently overlooked the warrantless entries made into Mr. McArthur's home. Prof. LaFave states that the *Segura* majority did not really "approv[e] warrantless entry and impoundment even absent truly exigent circumstances, for the majority parses the police conduct in *Segura* into its 'seizure' and 'search' components, and with respect to the 'seizure' part is not really taking into account the fact of entry." LaFave, at 365. Prof. LaFave recognized that if the police enter the premises in order to secure evidence, "then there has been *both* a seizure and a search." LaFave, at 366 (emphasis in original)(citing *Segura*, 468 U.S. at 806, 827 (Burger, C.J., joined by O'Connor, J.; Stevens, J., dissenting)). All members of the *Segura* Court "appear to accept the proposition that a search (i.e. entry) of the premises to facilitate the impoundment requires *both* probable cause and exigent circumstances." LaFave, at 366 (emphasis in original).

Thus, what can be learned from *Segura* with respect to this case is that the seizure of and warrantless entries into Mr. McArthur's premises required both probable cause and exigent circumstances. Although probable cause existed for the issuance of the search warrant following the trial court's consideration of the affidavits and testimony prior to issuing the warrant, the same cannot be said with respect to the seizure and warrantless

entries into Mr. McArthur's home. (Jt. App. at 5-10; 31, 38). The Illinois Appellate Court incorrectly stated that Mr. McArthur did not dispute that probable cause existed for the securing of his home. (Pet. App. 12). Mr. McArthur did not concede this question before the trial or appellate courts; rather, his Brief focused on the illegality of the seizure. (Jt. App. at 31, 38; Defendant-Appellee Brief; Plaintiff-Appellant Brief, at 14). In fact in his motion to suppress, Mr. McArthur contended that the seizure amounted to an arrest without probable cause. (R. Vol. I, C40; Plaintiff-Appellant Brief, at 13-14).

Officer Love did not have probable cause to effect a search or seizure of Mr. McArthur's home. Probable cause exists when the totality of the facts and circumstances known to the officer would lead a reasonable, prudent person, standing in the shoes of the officer, to conclude that evidence of a crime will be discovered or that the property contains evidence of a crime. *People v. Lukach*, 263 Ill. App. 3d 318, 635 N.E.2d 1053 (2d Dist. 1994). When the police receive their information from a witness or informant that a suspect has contraband in his possession, it is generally required that the officer elicit some information demonstrating that the witness or informant is familiar with the appearance of the contraband before probable cause will be found to exist. See e.g. *People v. Payne*, 239 Ill. App. 3d 698, 607 N.E.2d 375 (5th Dist. 1997); *People v. Palanza*, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (3d Dist. 1978); *People v. Odom*, 83 Ill. App. 3d 1022, 404 N.E.2d 997 (3d Dist. 1980). Here, Mrs. McArthur did not tell Officer Love that she was familiar with what marijuana looked like, although she later stated that fact in her affidavit for a search warrant. (Jt. App. 9-10, 20). Thus, Officer Love did not have probable cause to seize Mr. McArthur's house or make warrantless entries inside. This conclusion is supported by Officer Love's own actions. He did not arrest Mr. McArthur until after the search warrant was

executed. (Jt. App. 23-24). Therefore, Officer Love did not even meet the first prong of the *Segura* test. Additionally, the State failed to prove the existence of exigent circumstances.

Probable cause did not exist for the seizure of Mr. McArthur's home. However, if this Court disagrees, then the Fourth Amendment's balancing test weighs in favor of Mr. McArthur. This Court should reject the State's attempt to balance its interests in prosecuting Mr. McArthur for two misdemeanor offenses solely against a two-hour external seizure of his home because that is not what occurred. Rather, the Court should balance the State's interests against the seizure of Mr. McArthur's home and the warrantless entries. Because the State's interest was in prosecuting Mr. McArthur for two misdemeanor offenses, the Court should find that the balance weighs in favor of protecting Mr. McArthur's possessory and privacy interests in his home.

2. Seizure of a person

The next question to be answered is whether Mr. McArthur's person was seized. The State asserts that Mr. McArthur was not seized because he was not under arrest, nor was he physically restrained because he could go anywhere he wanted except inside his home. (Pet. Brief at 13). The Illinois Appellate Court was "unclear" whether Officer Love's conduct amounted to a seizure of Mr. Mc Arthur. (Pet. App. at 13).

In this case, the police did not tell Mr. McArthur that he could leave, nor did they tell him he had to stay. (Jt. App. 29). Also, he was not placed in handcuffs or physically restrained in any fashion until after the search warrant was executed. (Jt. App. at 29). Certainly, Mr. McArthur's freedom of movement was restrained when it came to entering his home alone. The limited restriction of Mr. McArthur's movement was part of the

seizure of his home, not a seizure of his person.

B. Whether a Warrantless Entry and Search Occurred

Next, the Court should decide whether a warrantless search of Mr. McArthur's home occurred. The members of the *Segura* Court appear to agree that a warrantless entry into a home in order to effect an impoundment constitutes a search. LaFave, at 366 (citing *Segura*, 468 U.S. at 806, 827 (Burger, C.J., joined by O'Connor, J.; Stevens, J., dissenting). The State glosses over the fact that Officer Love made warrantless entries into Mr. McArthur's home in order to secure the evidence inside of two misdemeanor offenses. Officer Love did not merely stand in the doorway." (Pet. Brief at 4). According to his testimony, Officer Love admitted that he crossed the threshold, and stood by the doorway when Officer Love gave Mr. McArthur permission to enter his home and use the phone. (Jt. App. 18, 28). Officer Love did not need to go any further than the doorway to observe Mr. McArthur's actions because the phone was right by it. (Jt. App. 30). Apparently, since Officer Love's "brief entries yielded nothing incriminating", the State believes that both the Illinois Appellate Court, and this Court should overlook those warrantless entries.

This Court should reject the State's characterization of Officer Love's conduct and find that a warrantless search of Mr. McArthur's home occurred. If the Court agrees that a search occurred, it must then decide whether it was unreasonable under the circumstances.

"It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984)(quoting *United States v. United States District Court*,

407 U.S. 297, 313 (1972)). The overriding respect for the sanctity of the home has been embedded in our history since the beginning of the Republic:

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.'

Payton v. New York, 445 U.S. 573, 601 n.54 (1980) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

The mere reasonableness of the entry assessed in the light of the surrounding circumstances should not be a substitute for the judicial warrant required under the Fourth Amendment. See cf. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). As this Court has observed:

> 'The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement."

Id. at 759 (quoting *Coolidge v. New Hampshire* 403 U.S. 443, 481 (1971)).

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson*, 333 U.S. at 14. "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714 (1984). There are only a few established exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Among these are the existence of exigent circumstances and consent to entry.

1. Exigent circumstances

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *Coolidge*, 403 U.S. at 455; *Payton v. New York*, 445 U.S. 573, 586 (1980). Police action undertaken without a warrant due to exigent circumstances must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968). When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut. See cf. *Welsh*, 466 U.S. at 750.

Although the possible destruction of evidence is a commonly claimed exigency, this Court has not defined the

circumstances under which officers may make warrantless entries into homes to prevent the loss of evidence. However, *Vale v. Louisiana*, 399 U.S. 30, 35 (1970), implies that evidence must "be in the process of destruction" to qualify as an exigent circumstance justifying a warrantless entries. Additionally, the Circuit Courts of Appeal have consistently held that warrantless entries into private residences are not permissible on the grounds of fear that evidence was likely to be lost. Rather, a showing that destruction of evidence was imminent was required. See e.g. *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Davis*, 423 F.2d 974 (5th Cir.), *cert. denied*, 400 U.S. 838 (1970); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988); *United States v. Driver*, 776 F.2d 807 (9th Cir. 1985). Several state courts have also agreed that exigent circumstances require more than a mere apprehension that evidence will be destroyed. *Youtz v. State*, 494 So. 2d 189 (Ala. Ct. App. 1986); *Commonwealth v. Hamilton*, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987).

Moreover, "even with probable cause to arrest, the destruction of evidence alone justifies a warrantless entry into the home only when the state interest in preventing the crime (as determined by the penalty imposed for violations) is sufficiently great." *United States v. Aquino*, 836 F.2d 1268, 1271 (10th Cir. 1988)(citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). As one court has observed, the exigent circumstance of destruction of evidence exception to the warrant requirement "must not be permitted to swallow the rule: in the absence of showing of true necessity—that is an imminent and substantial threat to life, health or property—the constitutionally guaranteed right to privacy must prevail." *People v. Smith*, 7 Cal. 3d 282, 101 Cal. Rptr. 893, 895, 496 P.2d 1261, 1263 (1972). Furthermore, it is clear that the police cannot, through their

own conduct, create exigent circumstances justifying a warrantless entry where none otherwise existed. *United States v. Thompson*, 700 F.2d 944 (5th Cir. 1983); *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986); *cf. McDonald v. United States*, 335 U.S. 451, 454-56 (1948); *Commonwealth v. Hamilton*, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987).

In this case, Officer Love admitted that he entered into Mr. McArthur's home despite being denied permission to search. (Jt. App. at 16-18). Therefore, the burden is on the State to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attached to Officer Love's entries. The State argues that the exigency of imminent destruction of evidence was present. However, there were no exigent circumstances justifying the warrantless entries into Mr. McArthur's home that were not created by the police officers themselves. Although Mr. McArthur was clearly aware of the police presence outside his home while his wife moved her things out, the 2.3 grams of marijuana, one hitter and pipe were not in "imminent" danger of destruction. Mr. McArthur did not make any attempt to destroy the 2.3 grams of marijuana or the drug paraphernalia until the police knocked on his door, told him that his wife had reported drugs inside, and asked if they could search. (Jt. App. 25-27). Thus, the police had no specific evidence of imminent destruction sufficient to satisfy the exception to the warrant requirement for Officer Love's entries into Mr. McArthur's home.

Moreover, assuming that the evidence of Mr. McArthur's misdemeanor offenses was in imminent danger of destruction, preserving the 2.3 grams of marijuana, one hitter and pipe did not justify the warrantless entries into Mr. McArthur's home in order to secure them. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

In *Welsh*, the petitioner was arrested following a warrantless entry into his home. The police had received reports that the petitioner had been driving erratically, swerved off the road into a field, then left his car and walked away from the scene. They gained entry into the petitioner's home when his stepdaughter answered the door and arrested petitioner for driving under the influence of an intoxicant. The petitioner was subjected to two proceedings: one was a civil violation under the Wisconsin vehicle code; and the other was based on a criminal charge of driving under the influence. The petitioner moved to dismiss the criminal complaint on the grounds that his arrest was illegal. The trial court denied his motion, the Wisconsin Court of Appeals reversed, and the Supreme Court of Wisconsin reversed the Court of Appeals. This Court in turn reversed the Wisconsin Supreme Court.

The *Welsh* Court stated that no exigency is created simply because there is probable cause to believe that a serious crime has been committed. "Moreover, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed." Id. at 753. The Court rejected the State's argument that the arrest was justified to preserve evidence of petitioner's blood alcohol level. It noted that petitioner was charged with a first offense for driving while intoxicated—a noncriminal, civil forfeiture offense without possibility of imprisonment. [3] This Court found that the State's interest in

[3] The petitioner was in fact charged with a criminal misdemeanor because he had received a previous citation for DUI; however, at the time the police entered his home they did not know about petitioner's previous conviction and therefore, it had to be presumed that the police were acting on a nonjailable traffic offense. *Welsh*, at 748 n. 6.

preserving evidence of petitioner's blood alcohol level did not qualify as exigent circumstances for the warrantless entry into the petitioner's home to arrest him.

Likewise, the State's interest in prosecuting Mr. McArthur for Class A and Class C misdemeanors did not qualify as exigent circumstances justifying Officer Love's warrantless entries into Mr. McArthur's home in view of the Fourth Amendment's overriding concern for the sanctity and privacy of the home. Furthermore, once Mrs. McArthur told the police about the marijuana and paraphernalia inside the trailer, the officers could have easily left with her without telling Mr. McArthur about the incriminating information, obtained a search warrant, and returned to retrieve the evidence and arrest Mr. McArthur. Thus, the evidence likely would have remained intact if the officers had left with Mrs. McArthur and complied with the warrant requirement.

The State argues that the police did not create the exigency by asking consent to search because that was part of an informal investigative procedure. (Pet. Brief at 22 n.9). This Court should reject that argument because the emergency that was created by the officer's request for consent was foreseeable. *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974). As noted by the *Rosselli* court, "this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." Id. at 630. The police could simply ask for consent and when it is denied, the officers could nonetheless enter into the home on the grounds that the evidence will be destroyed if quick action isn't taken to preserve it.

In this case, the Illinois Appellate Court correctly found that no exigency existed for Officer Love's warrantless entries into Mr. McArthur's home. Any exigency concerning the destruction of evidence was created by the officers themselves once they informed Mr. McArthur that they believed he had marijuana inside. As noted above, a ruling that this type of conduct does not contribute to the creation of the exigency of destruction of evidence will result in officers being able to create such exigencies at will and by-pass the warrant requirement, especially in narcotics cases since drugs are easily destroyed.

2. Consent to entry

The State also contends that because Officer Love was entitled to prevent Mr. McArthur from entering his home without a police escort, Mr. McArthur consented to Officer Love's entries when he wanted to go inside to obtain cigarettes and use the phone. (Pet. Brief, at 22). Thus, the State concludes "Officer Love's terms essentially empowered both the officer and [Mr. McArthur]. Officer Love was entitled to keep [Mr. McArthur] out of the trailer entirely; similarly, had [Mr. McArthur] desired to prevent Officer Love from entering, he could have done so by simply staying outside himself." (Pet. Brief, at 23). The State argues that the real consequences of Officer Love's brief entries was to lessen the intrusion upon Mr. McArthur's possessory interests by permitting him to exercise some control over his own home. (Pet. Brief, at 23). The State also observes that Officer Love saw nothing of consequence as a result of his looks inside Mr. McArthur's trailer and therefore, his entries could not have contributed in any way to the discovery of the 2.3 grams of marijuana, one hitter and pipe.

Before the Illinois Appellate Court, the State did not argue that Mr. McArthur consented to Officer Love's entries. (Plaintiff-Appellant Brief). In fact, the State admitted that Mr. McArthur did not consent. (Plaintiff-Appellant Brief, at 21, 31). Therefore, this Court should deem that argument waived.

However, if this Court considers this issue, each of the State's arguments should be rejected. The State's first argument relies on a finding by this Court that Officer Love did not violate Mr. McArthur's Fourth Amendment rights by seizing his home and possibly seizing his person. In other words, the State is asking this Court to announce a rule that if the State does not illegally seize a home or its owner when it prevents him from entering inside, then he automatically consents for the police to enter his home without a warrant if the owner desires to enter to retrieve an important object, use the phone, or perhaps use the bathroom. This argument ignores the true meaning of "consent" to search. (Pet. Brief, at 22).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court announced the standards to be applied in determining whether consent to a search is freely given by a person who is not in custody. When the State seeks to rely on consent to a search to justify its lawfulness, it bears the burden of proving that consent "'was, in fact, freely and voluntarily given.'" Id. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). In making this determination, courts should look to the totality of the circumstances to determine whether the consent was "coerced by threats or force, or granted only in submission to a claim of lawful authority". Id. at 233; See also *People v. Wahlen*, 111 Ill. App. 3d 194, 443 N.E.2d 728 (4th Dist. 1982).

In *Johnson v. United States*, 333 U.S. 10 (1948), the police received a tip from a confidential informant that someone

was smoking opium in the Europe Hotel. The officers went inside the hotel, recognized the smell of burning opium and knocked on the petitioner's door because that was the room from which the smell was coming. The police gained entry into the petitioner's hotel room when they knocked on the door, announced themselves as police officers, and the petitioner opened the door, "'stepped back acquiescently and admitted [them].'" Id. at 12. After entering the room, the police told the petitioner to consider herself under arrest and that they were going to search the room. The search turned up incriminating evidence.

This Court concluded that the search was unlawful. This Court observed that the entry into the petitioner's living quarters, which was the genesis of the search, "was demanded under color of office." Id. at 13. Accordingly, "[i]t was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." Id.

Here, Mr. McArthur expressly told Officer Love that he could not go inside his home without a warrant. (Jt. App. 28). Thus, Mr. McArthur did not voluntarily consent to Officer Love's entries. Likewise, Mr. McArthur did not give his implied consent by entering into his own home to make phone calls to his mother and sister, and to get cigarettes. Mr. McArthur was told that he could not go inside his home alone so that he could destroy evidence. (Jt. App. 21). Officer Love refused Mr. McArthur's requests to go inside alone to make his calls and retrieve his cigarettes. (Jt. App. 17-18). Clearly, Officer Love entered Mr. McArthur's home under color of office. Mr. McArthur's entries into his home accompanied by Officer Love was a submission to authority, not voluntary consent.

This Court should likewise reject the State's argument

that Officer Love's entries lessened the intrusion upon Mr. McArthur's possessory rights. Officer Love's entries constituted an even greater intrusion upon Mr. McArthur's Fourth Amendment rights. Although, Mr. McArthur was concealing evidence of two misdemeanor crimes, his expectation of privacy in his home was not diminished and he was nonetheless entitled to keep Officer Love outside until he had a warrant. Under the State's argument, Mr. McArthur's possessory rights could not be enjoyed without giving up his right to privacy in his own home. Given that the invasion of the home by the government is the chief evil at which the Fourth Amendment is directed, it is hard to imagine how the intrusion upon Mr. McArthur's rights were lessened by Officer Love's warrantless entries.

Finally, the Court should reject the State's assertion that since Officer Love did not see anything incriminating during his entries, they should not be considered illegal. In other words, the State is essentially asking this Court to issue a ruling of "no harm, no foul". This is not the standard for determining whether an impermissible warrantless entry occurred. See c.f. *Hawaii v. Dorson*, 62 Haw. 326, 615 P.2d 740 (1980). Furthermore, as argued below in the application of the exclusionary rule section, Officer Love's warrantless entries prevented Mr. McArthur from destroying his 2.3 grams of marijuana, one hitter and pipe. Thus, Officer Love's warrantless entries significantly contributed to the discovery of the evidence against Mr. McArthur. Accordingly, the State has not met its burden with respect to justifying Officer Love's warrantless entries into Mr. McArthur's home.

II. THIS COURT SHOULD BAR SEIZURES OF AND WARRANTLESS ENTRIES INTO HOMES TO PRESERVE EVIDENCE IN CASES WHERE MISDEMEANOR OFFENSES ARE INVOLVED

After this Court determines whether a search and seizure of Mr. McArthur's home took place during the impoundment procedure, it must decide whether those actions were reasonable. Because the Fourth Amendment represents an attempt to balance the government's interest in enforcing laws against individuals' privacy interests, its application to impoundment cases "should reflect an effort to look to 'the scope of the particular intrusion, in light of all the exigencies of the case'" including the seriousness of the offense. See cf. W. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations-Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 488-89 (1991)(hereinafter "Schroeder") (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

In *Welsh*, this Court explicitly held that the seriousness of the offense is relevant in determining whether the police violated the Fourth Amendment with respect to a warrantless entry into the home. The *Welsh* Court acknowledged that its holding that preserving evidence of minor offenses did not create exigent circumstances justifying warrantless entries was not a novel idea, quoting Justice Jackson's concurring opinion in *McDonald v. United States*, 335 U.S. 451 (1948):

> 'Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. . . . Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well

> as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime.... While the enterprise of parting fools from their money by the "numbers" lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant'

Welsh, 466 U. S. at 751 (quoting *McDonald,* 335 U.S. at 459-60 (Jackson, J. concurring)); see also *Payton v. New York*, 445 U.S. 573, 616-17 (1980) (White, J., dissenting). Thus, it is logical that this Court should continue to look at the nature of the underlying charge in determining whether a warrantless seizure and impoundment of the home from the outside, as well as a warrantless entry into it to secure evidence, violates the Fourth Amendment.

Taking their cue from *Welsh*, and its noted approval of *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) several state and federal courts have considered the seriousness of the offense alone or factored it in along with other matters in determining whether exigent circumstances exist justifying a

warrantless entry into the home. See e.g. *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987)(distribution of a controlled substance); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985)(pursuit of suspected murderer); *United States v. Baldacchino*, 762 F.2d 175 (1st Cir. 1985)(possession of narcotics with intent to distribute); *State v. Bennett*, 295 N.W.2d 5 (S.D. 1980)(distribution of a controlled substance); *State v. Canby*, 162 W. Va. 666, 252 S.E.2d 164 (1979)(multiple arsons); *Commonwealth v. DiSanto*, 8 Mass. App. Ct. 694, 397 N.E.2d 672 (1979)(armed robbery and attempted murder of two police detectives); *Conway v. Pasadena Humane Society*, 48 Cal. App. 4th 163, 52 Cal. Rptr. 2d 777 (1996)(entry to seize dog that was in violation of city ordinance); but see *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973)(possession of 90lbs of hashish). More specifically, several state and federal courts have acknowledged that the seriousness of the offense is an important factor in deciding whether a warrantless entry into a home is permissible to prevent the destruction of evidence. See *State v. Guertin*, 190 Conn. 440, 461 A.2d 963 (1983)(sexual assault and burglary); *State v. Clark*, 218 Kan. 726, 544 P.2d 1372, *cert. denied*, 426 U.S. 939 (1976); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir), *cert. denied*, 488 U.S. 858 (1988)(conspiracy to distribute narcotics); *United States v. Cattouse*, 846 F.2d 144 (2d Cir.), *cert. denied*, 488 U.S. 929 (1988)(conspiracy to distribute narcotics); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988)(illegal possession of firearm); *United States v. Martinez-Gonzalez*, 686 F.2d 93 (2d Cir. 1982)(conspiracy to possess and distribute narcotics); *State v. Storvick*, 428 N.W.2d 55 (Minn. 1988)(vehicular homicide); *State v. Ramirez*, 49 Wash. App. 814, 746 P.2d 344 (1987)(possession of heroin and cocaine); *Youtz v. State*, 494 So. 2d 189 (Ala. Crim. App. 1986)(drug trafficking); *cf. People v. Reinhardt*, 141 Mich. App. 173, 366 N.W.2d 601 (1986)(misdemeanor offense); *People v. Miller*, 773 P.2d 1053

(Colo. 1989)(exigent circumstances did not exist for warrantless home entry when probable cause existed that defendant committed first degree sexual assault of minor).

These decisions indicate a trend for courts to uphold warrantless entries into private residences to prevent the destruction of evidence when relatively serious offenses are involved, and to find a Fourth Amendment violation when the warrantless entry occurred with respect to a minor offense. Even the cases cited by the State for the proposition that impoundment of the home to preserve evidence is constitutional involved serious offenses. See *State v. Alayon*, 459 N.W.2d 325 (Minn. 1990), *cert. denied*, 498 U.S. 109 (1991)(possession of cocaine with intent to distribute); *State v. Hull*, 210 Conn. 481, 556 A.2d 154 (1989)(impoundment of truck upheld in murder case); *State v. DeLane*, 207 N.J. Super. 45, 503 A.2d 903 (1986)(upheld posting guard outside residence in case of possession of controlled substance with intent to distribute, but no exigent circumstances existed for warrantless entry into home); *Jones v. State*, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995)(police should have posted guard to secure evidence in murder case); *People v. Griffin*, 727 P.2d 55 (Colo. 1986)(possession with intent to distribute controlled substance); *State v. Knight*, 340 N.C. 531 , 459 S.E.2d 481 (1995)(first degree murder); *State v. Smith*, 458 N.W.2d 779 (S.D. 1990)(seizure of automobile to recover stolen property); *State v. Kin Ng*, 104 Wash. 2d 763, 713 P.2d 63 (1985)(murder); *United States v. Riley*, 968 F.2d 422, 425 n.5 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992)(possession of firearm by a felon); *United States v. Scheets*, 188 F.3d 829 (7th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 837 (2000)(defendant consented to search following bank robbery); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997)(possession of a controlled substance with intent to deliver); *United States v. Crespo De Lano*, 838

F.2d 1006 (9th Cir. 1987)(possession of controlled substance with intent to deliver); *United States v. Morales*, 868 F.2d 1562 (11th Cir. 1989)(possession of a controlled substance with intent to deliver).

The question becomes how does the Court articulate a standard with respect to the seriousness of an offense for courts and police officers to readily apply in determining whether the seizure of and warrantless entry into the home when its occupants are present for the purpose of securing evidence is constitutionally permissible. This Court has recognized the need for easy to apply and familiar standards "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

Likewise, scholars have suggested guidelines for the establishment of bright line rules in Fourth Amendment areas where necessity dictates foregoing a case-by-case analysis. See e.g. Schroeder, at 557-59; W. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 Mich. L. Rev. 427, 452 (1986). Prof. LaFave has pondered whether a rule proscribing when warrantless entries are permissible "will be defined in a way which is understandable by police and which will not result in it being an exception which in effect swallows up the general rule that a warrant is needed to search premises." W. LaFave, *Search and Seizure*, sec. 6.5(b) at 342 (3d ed.1996). He suggests that bright line rules can be created when: 1) the proposed rule has clear and absolute boundaries; 2) if application of the rule obtains similar results to a case-by-case adjudication; and 3) if the rule cannot easily be manipulated or abused. W. LaFave, 85 Mich. L. Rev. at 452.

One commentator has suggested that the Court establish the line with respect to warrantless entries "to coincide with the line most jurisdictions use to distinguish misdemeanors from felonies." Schroeder, at 472. Professor Schroeder suggests:

> "If less than one year's imprisonment may be imposed for a particular offense, and most jurisdictions would therefore view that offense as a misdemeanor, warrantless entries for that offense should be barred. When only an ordinary felony is involved, the seriousness of the offense should be irrelevant to the decision to obtain a warrant. Instead, the permissibility of warrantless entries in ordinary felony cases should be determined solely by reference to the other factors that traditionally have been relevant to that question. These factors include the likely destruction of evidence, the danger of violence, and the prospect of the suspect's escape."

Schroeder, at 472. This test is in keeping with the reasonableness requirement of the Fourth Amendment, is easily used by the police and the judiciary, and respects the sanctity of the home.

Professor Schroeder also identifies eight advantages of a rule barring warrantless home entries directed against misdemeanants as follows: 1) a warrant requirement might discourage dangerous police activities; 2) review of the facts by a neutral magistrate will reduce the incidences of unjustified home entries; 3) the warrant requirement will prevent hindsight from influencing the evaluation of the reasonableness of a search since there will be a contemporaneous recordation of the basis for the search; 4) showing a warrant before entering reduces public perception of unlawful or intrusive police conduct and perhaps reduces the risk of resistance or violence; 5) because courts prefer warrants, more searches conducted pursuant to a

warrant might be upheld that would have otherwise been invalidated if conducted without a warrant; 6) "if the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984), does not extend to warrantless activities, some activities pursuant to a warrant will be upheld while those same activities would be invalidated if conducted without a warrant"; 7) a warrant will protect officers against claims for damages brought by individuals contending that the entry was unconstitutional; and 8) a warrant requirement may enhance respect for the law as some people might be outraged if warrantless entries were permitted against minor offenders. Schroeder, at 541 [citations omitted].

Additionally, the felony/misdemeanor distinction comports with Prof. LaFave's suggestion for a bright line test. The felony/misdemeanor line has clear boundaries that are easily discerned and applied by officers and courts. Application of this distinction would achieve the same results within a state and similar results from state to state. Finally, the rule could not be easily manipulated or abused in cases, such as Mr. McArthur's where the police could have questioned Mrs. McArthur concerning the amount of marijuana she saw in her husband's home. In fact, in most of the cases cited above the officers had an idea about the seriousness of the offense at issue either through informants, undercover agents, or from visible or audible clues at the scene. Thus, the police should be able to readily ascertain at the scene whether they are dealing with a felony or misdemeanor offense.

Prof. Schroeder's test is also in keeping with this Court's pronouncements. The *Welsh* majority appears to have suggested categories of offenses indicating that the seriousness of the crime draws the line by which the police can enter a home without a warrant as follows: no warrantless entries are permissible for

"'extremely minor'" offenses and rarely permissible for "'minor'" crimes; and warrantless home entries are permissible under the "'usual'" circumstances for "'ordinary'" offenses and are allowed with "'special frequency'" for "'serious'" crimes. Schroeder, at 501. Moreover, "[t]he felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes." *Payton v. New York*, 445 U.S. 573, 617 (1980) (White, J., dissenting); see cf. *Steagald v. United States*, 451 U.S. 204, 215 (1981)(exceptions to the warrant requirement must not permit the "potential for abuse").

The state supreme courts of Connecticut and West Virginia have approved a substantially similar test in warrantless entry cases to that offered by Prof. Schroeder. In *State v. Guertin*, 190 Conn. 440, 461 A.2d 963 (1983), the Connecticut Supreme Court borrowed a test from the Supreme Court of Appeals from West Virginia to apply to determine the permissibility of warrantless home entries. *Guertin*, at 453, 461 A.2d at 970 (citing *State v. Canby*, 252 S.E.2d 164, 167 (W. Va. 1979)). This test could be modified for application to warrantless seizures of and entries into homes when their owners are present in order to secure evidence. The *Canby* test, originally formed as a test of exigent circumstances for the making of an arrest for a felony without a warrant, "is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others." *Guertin*, 190 Conn. at 453, 461 A.2d 963, 970. The *Canby* test is objective—"'its preeminent criterion is what a reasonable, well-trained police officer would believe, not what the arresting officer actually did

believe.'" *Guertin*, at 453, 461 A.2d at 970 (quoting *Canby*, 252 S.E.2d at 167.

The *Guertin* court observed that the *Canby* rule "had much to commend it." *Guertin*, at 453, 461 A.2d at 970. This rule is in keeping with the mandate of the Fourth Amendment by protecting the privacy of the home. Moreover, it narrowly and precisely draws an exception to the warrant requirement to "cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded." Id. Finally, the *Canby* rule "is clear enough so that . . . the police may know the limitations of their authority." Id.

Though not without some problems, the felony/misdemeanor line would provide a clear indication of the seriousness of an offense that is easily identifiable by the courts and officers faced with a decision to make a warrantless entry into a home or similarly protected dwelling. Schroeder, at 508, 533; W. LaFave & A. Scott, *Criminal Law*, sec. 6, at 26 (1972). Nearly every jurisdiction draws this distinction. Schroeder, at 508. Moreover, it is in keeping with the common law that held that a warrant was required for a misdemeanor arrest when not committed in the officer's presence, whereas a felony arrest could be made on the basis of probable cause. see cf. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985)(Fourth Amendment to be construed in light of common law which distinguished between felons and misdemeanants when it came to using whatever force necessary to effect the arrest of a fleeing suspect). Additionally, the widespread use of the felony/misdemeanor distinction in other criminal settings demonstrates its usefulness in warrantless entry to secure evidence cases. Schroeder, at 510-13.

This Court has used the distinction between serious and petty offenses in determining whether the Constitution guarantees such rights as trial by jury or legal counsel. See e.g. *Duncan v. Louisianna*, 391 U.S. 145, 154-62 (1968); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); but see *Tennessee v. Garner*, 471 U.S. 1 (1985)(noting difficulty with the felony/misdemeanor distinction and focusing on the nature of the harm to be averted in determining whether deadly force warranted); see also Schroeder, at 513 n317. Similarly, several state and federal courts have utilized the seriousness of the offense in applying the reasonableness test in other Fourth Amendment settings. Schroeder, at 536 n. 445.

The State may contend that a rule barring warrantless seizures of and entries into homes for the purpose of securing evidence in misdemeanor cases will cause criminals to go free. Certainly, prohibiting warrantless entries in misdemeanor cases will result in some offenders escaping prosecution. However, as observed by Professor Schroeder:

> [I]t is difficult to view the inability to convict a few minor offenders as a significant cost. The vast majority of misdemeanors probably go unnoticed and unreported. Of those that are reported, the majority are never cleared by arrest, and many of those arrests do not lead to conviction. Most misdemeanor convictions do not lead to jail or to other substantial sentences.
>
> Even in the case of serious crimes, public safety is less threatened by a person who committed a past crime but who now is 'going about his lawful business than it is by a suspect who is currently in the process of violating the law.' In the case of misdemeanors the threat posed by past offenders is often insignificant. . . . Most

> minor offenders, however, will simply go about their lawful business whether or not they are apprehended. Moreover, even those minor offenders inclined to commit more crimes are unlikely to do significant damage during the brief delay in their apprehension caused by a warrant requirement. Under these circumstances, there are few compelling reasons, absent a present threat of violence, not to require that the police await a warrant before entering the home of a minor offender.

Schroeder, at 539 [citations omitted].

It is doubtful that society will suffer serious consequences if impoundments of homes, including warrantless entries to preserve evidence, are not allowed in misdemeanor cases such as neighbors playing nickel-dime poker in the living room (720 ILCS 5/28-1, Class A misdemeanor); or where a shoplifter has taken a pack of gum (735 ILCS 5/16-1, Class A misdemeanor); or where college students have obtained cable television for their apartment without paying for it (720 ILCS 5/16-10, Class A misdemeanor). Accordingly, this Court should view with skepticism arguments that effective law enforcement will suffer if a warrant requirement is imposed as a precondition to the securing of homes both inside and out when misdemeanor offenses are involved. See cf. *Payton v. New York*, 445 U.S. 573, 602 (1980).

Likewise, this Court should reject any argument that states will rush to increase penalties for petty offenses in order to circumvent a rule permitting the securing of evidence by impoundment only in felony cases. History demonstrates that states do not reclassify misdemeanor offenses as felonies in order to increase the number of crimes for which warrantless law

enforcement activities are permissible. Schroeder, at 517 (noting that there was no rush to reclassify or increase sentences for misdemeanor offenses in states that did not authorize by statute misdemeanor arrests for misdemeanors not committed in the presence of an officer following this Court's decision in *United States v. Watson*, 423 U.S. 411 (1976)). Moreover, other incentives exist in preventing states from reclassifying offenses including the greater expense naturally associated with prosecuting felony crimes such as jury trials, counsel for indigent defendants and jail space. Schroeder, at 517.

An analysis of the costs and benefits of a rule prohibiting seizures of the home and warrantless entries in order to preserve evidence in misdemeanor cases comports with the Fourth Amendment's reasonableness requirement as it reflects the balancing of competing interests. Accordingly, this Court should draw the line between constitutionally permissible and impermissible impoundment of homes from the inside and outside in order to secure evidence based on the seriousness of the offense.

In this case, such a balancing test reveals that the impoundment of Mr. McArthur's home and the warrantless entries by Officer Love violated the Fourth Amendment. As reflected by the possible sentences for both misdemeanors for which Mr. McArthur was charged, the State of Illinois did not have a great interest in protecting society at large from Mr. McArthur's activities within his own home. Moreover, under the eight factors cited above, the public's interest in prosecuting Mr. McArthur is outweighed by the advantages in requiring the police to obtain a warrant before impounding the home of a person suspected of committing a misdemeanor.

III. THE POLICE OFFICER'S VIOLATION OF THE FOURTH AMENDMENT WARRANTS EXCLUSION OF THE EVIDENCE OF MR. MCARTHUR'S MISDEMEANOR ACTIVITIES

Should this Court determine that Officer Love's actions violated the Fourth Amendment, then the Court must decide whether the evidence against Mr. McArthur should be suppressed. Generally, when police conduct violates the Fourth Amendment, then the exclusionary rule requires suppression of all evidence obtained as a result of that misconduct. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

The United States, as *amicus curiae*, contends that even if the officers' actions violated the Fourth Amendment, the evidence against Mr. McArthur should not have been suppressed because it was obtained pursuant to a valid warrant. Before the Illinois Appellate Court, Mr. McArthur contended that the State waived this argument by not presenting it before the trial court. (Defendant-Appellee's Brief, at 3). Mr. McArthur takes the same position before this Court. Petitioner has not even challenged this issue and an amicus party should not be allowed to circumvent the waiver rule.

However, as noted by Justice Stevens in his dissenting opinion in *Segura*, the evidence in issue would not have come to the State's attention if not for its illegal conduct. *Segura*, 468 U.S. at 832-35 (Stevens J., dissenting). In *Segura*, the majority stated that it would have been speculation to assume that the evidence against Segura would have been destroyed by his comrades if the apartment had not been occupied by the police. In this case, there is no doubt that but for Officer Love's actions, Mr. McArthur would have destroyed the 2.3 grams of marijuana, one hitter and pipe. Thus, there is clearly a causal

connection between the police's conduct and their ability to obtain the evidence against Mr. McArthur. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The United States correctly observes that the *Segura* majority rejected the notion that the exclusionary rule should be applied in a manner essentially giving people a "constitutional right to destroy evidence." *Segura*, 468 U.S. at 816. However, if the Court chooses to address this issue, it should revisit its holding in *Segura* with respect to the facts of this case.

Here, application of the exclusionary rule is particularly important in two respects. First, it is in keeping with the rule's purpose. "Every time a court holds that unconstitutionally obtained evidence may not be used in a criminal trial it is acutely aware of the social costs that such a holding entails. Only the most compelling reason could justify the repeated imposition of such costs on society. That reason, of course, is to prevent violations of the Constitution from occurring." *Segura v. United States*, 468 U.S. 796, 827 (Stevens, J., dissenting)(citing *Olmstead v. United States*, 277 U.S. 438, 470 (1928)(Holmes, J., dissenting)). If the Court determines that the police actions taken in this case violate the Fourth Amendment, and does not exclude the evidence, then the State's conduct "remains an illegality only in the theoretical sense, undeterred by any realistic threat of exclusion." LaFave, at 367; see also *United States v. Korman*, 614 F.2d 541 (6th Cir, 1981)(Merritt J., dissenting). In other words, without application of the exclusionary rule, there is no incentive for the police not to seize a person's home and make a warrantless entry inside under the guise of preserving evidence when they know that others are in the process of securing a warrant, because the warrant will always bring the evidence within the protection of the independent source doctrine.

The second reason application of the exclusionary rule in this case is appropriate is because it strikes a balance between the *Segura* majority and dissenting views. As discussed above, if this Court announces a rule that securing evidence within a home by seizures and warrantless entries is illegal in misdemeanor cases only, then excluding such evidence will effectively deter such police conduct and ensure that such intrusions on protected Fourth Amendment rights occur only when the states' interests in prosecuting individuals, as determined by the states' classifications of crimes, are especially great. As long as the crime at issue is a felony, the evidence will be admissible providing another exigency existed for the states' actions.

CONCLUSION

For the reasons given above, the State's actions in seizing Mr. McArthur's home and making a warrantless entry inside was unreasonable under the Fourth Amendment when compared to the State's interests in prosecuting him for two misdemeanor offenses. Although a ruling affirming the Illinois Appellate Court's decision will result in Mr. McArthur and possibly other minor offenders escaping prosecution "there is nothing new in the realization the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). Accordingly, Mr. McArthur respectfully requests that the Illinois Appellate Court's decision be affirmed.

Respectfully submitted,

Deanne Fortna Jones
Counsel of Record

Jeff Justice
Deanne Fortna Jones
515 Millikin Court
Decatur, Illinois 62523
(217) 422-9800
Counsel for Petitioner

August 14, 2000